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By. of Van Devanter for D.C.

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ERROR FROM THE SUPREME COURT OF THE STATE OF WYOMING.

JOHN KELLEY,
PLAINTIFF IN ERROR,
vs.
OLIVER F. RHOADS,
DEFENDANT IN ERROR.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

WILLIS VAN DEVANTER and
W. R. STOLL,
Attys. for Defendant in Error.

IN THE

Supreme Court of the United States.

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CONTENTION OF PLAINTIFF IN ERROR.

It is believed by the defendant in error that the plaintiff in error contends that the record discloses error both of law and of fact.

CONTENTION OF DEFENDANT IN ERROR.

The defendant in error believes that the record discloses only a question of fact, which fact was determined by the

trial Court adversely to the plaintiff in error, and which determination was not so palpably contrary to the evidence in the case as to require a reversal of such determination; and that there is no Federal question in the case.

THE POINTS INVOLVED.

It is believed that the foregoing statement of the contentions of the respective parties, and the correctness of the contention of the defendant in error, will appear from an examination of the record alone and may be elucidated by the following:

ARGUMENT.

I.

THE SECOND AND THIRD ERRORS ASSIGNED.

The plaintiff in error in his second and third assignments of error, together with his argument relating to the same, seems to contend that Chapter 61 of the Session Laws of Wyoming of the year 1895 is inimical to Section 8, Article 1, of the Constitution of the United States. It certainly cannot be contended that any other law of Wyoming upon the subject of taxation is unconstitutional for the same reason, for it is only this chapter that requires live stock brought into the State of Wyoming for the purpose of being grazed to be taxed.

When this case was originally before our Supreme Court, counsel contended very elaborately that this chapter was in violation of this Article of the Constitution. (See counsel's brief in Kelley vs. Rhoads, 7 Wyo. 237, at 244-247, as well as the opinion of the Court therein.)

The authorities cited by plaintiff in error in the case at bar, as well as the comments thereon, seem to carry out the

idea evidently entertained by plaintiff in error that the statute in question is, as a *statute*, unconstitutional for the reason assigned.

Defendant in error submits the following proposition on the subject:

PROPOSITION 1. The statute of the State of Wyoming requiring live stock, brought into the State for the purpose of being grazed, to be taxed, is a valid statute and not objectionable upon the ground that it is in violation of Sec. 8, Art. 1, of the Constitution of the United States.

Kelley vs. Rhoads, County Assessor, 7 Wyo., 327 and cases there cited.

The statute itself is so explicit and so evidently unobjectionable so far as its language is concerned and so far as any implication therefrom may be derived, the opinion of the Supreme Court of Wyoming upon this contention was so thorough and lucid, and the principles involved in a question of this kind are so elementary, that it is deemed unnecessary to cite further authorities.

If it should be argued that the second and third assignments of error do not aim to challenge the validity of the statute as a law but only its operation so far as it affects the property in this case, then we submit that the contention of the plaintiff in error as set forth in these two assignments amounts simply to a contention as to a question of fact, i. e. whether or not the sheep taxed were brought into Wyoming for the purpose of being grazed; for certainly if they were they could be taxed, and if they were not they could not be taxed. The question as to whether they were brought in for this purpose or whether they were not is a question of fact and nothing else. If any question of law were involved in the case at all it could be only such a question of law as is usually involved in the different facts

disclosed by the evidence in the case and not a question of law as to the validity of Chapter 61 of the Session Laws of Wyoming of the year 1895, or as to the validity of any other statute of the State of Wyoming.

In these assignments of error this particular chapter and other laws of the State of Wyoming seem to be assailed for their unconstitutionality, whereas a statute which simply provides that live stock brought into the State for the purpose of being grazed shall be taxed, or any other law of similar import, is not, either by its terms or by any necessary implication, an unconstitutional law. It must therefore follow that if there is any ground for complaint it must be found in the determination of the ultimate fact as to whether or not the property was brought into the State for the purpose of being grazed, and not in the invalidity of the Statute itself.

II.

THE FIRST, FOURTH, FIFTH AND SIXTH ERRORS ASSIGNED.

These assignments of error relate only to the question as to whether or not it was live stock brought into the State for the purpose of being grazed. The argument of the plaintiff in error assails the reasoning of the Honorable Chief Justice of the Supreme Court of Wyoming in the case at bar apparently upon two grounds: (1) That the reasoning of the learned Chief Justice is not supported by the facts in the case, and (2) That the authorities relied upon in the opinion do not support the judgment.

In this connection the defendant in error submits the following proposition:

PROPOSITION 2. It is incumbent upon the party who

complains of error in the determination of a matter of fact in the trial Court to disclose by the record that the determination of the fact as found by the trial Court was at least palpably contrary to the evidence in the case; and in the case at bar the record discloses no such facts as show the determination of the trial Court to have been palpably contrary to the evidence in the case.

Marshall vs. Rugg, 6 Wyo. 270, and cases there cited.

In this case the question as to the sufficiency of the finding of a question of fact made in the trial Court was assailed, and the finding as made was sustained upon the ground stated in the above proposition. Referring to a former Wyoming decision and quoting from it, the Court (p. 286) uses the following language:

"Where an appellate court is empowered to revise upon the facts, it can never reverse on them simply because upon the evidence, as submitted to it, it would have arrived at a different conclusion; and can only reverse when the verdict, or if the trial was by the court without a jury, the findings were so clearly against the weight of evidence that no mind of fair intelligence and faithfully exercised can be reasonably supposed to have arrived at the result which is complained of."

And on the same page, quoting from another of these decisions, the Court says:

"This court has time and again decided that it will not reverse the decision of the trial court when the evidence is conflicting, and where there is evidence tending to sustain the finding of the court, unless the findings of the court are so clearly against the weight of the evidence as to make it manifest that the evidence was entirely disregarded, or

that the court was influenced by passion or prejudice, or acted from some improper motive."

The above enunciation of the law relating to this matter, it is submitted, is simply in substantial accord with all of the authorities.

Tested by the rule here announced and briefly stated, we may say that it is incumbent upon the plaintiff in error to show that the determination of the trial Court that the sheep in question were brought into Wyoming for the purpose of being grazed, was palpably contrary to the facts in the case. It is not sufficient to show that under the same facts another judgment might have been entered. It is not sufficient to show that there might have been, or that there was, an ultimate purpose in the mind of the plaintiff in error to ship his sheep out of the State of Wyoming and from a point near the eastern boundary line of the State. It is not sufficient for the record to disclose merely that the sheep were being driven towards the point at which he put them upon the cars for shipment to their destination. Nor is it sufficient for the record to disclose that the sheep in question were driven as sheep ordinarily are driven while being grazed. It is incumbent upon the plaintiff in error to show either explicitly, or by necessary implication from surrounding facts and circumstances, that the sheep were not driven into the State of Wyoming for the purpose of being grazed.

The case was not a jury case but was submitted to the trial Court upon an agreed statement of facts, and if plaintiff in error now complains of the finding of the trial Court upon such facts he must base his complaint upon the failure of the facts agreed upon to justify the determination of the trial Court. It is too late now to complain if the agreed statement of facts was not sufficiently explicit to show the error complained of.

The agreed statement of facts does not say in so many words that the sheep were brought into the State for the purpose of being grazed nor does it say in so many words that they were not brought for such a purpose. It leaves the purpose as to the matter of grazing to be determined from the other facts stated. The facts stated (pp. 13-14 of the record) are so lucidly considered in the opinion of the Supreme Court of Wyoming (pp. 16-24 of the record) that any further statement in this brief upon these facts would be a work of supererogation.

It may, however, not be out of place to suggest some facts in addition to those mentioned, and of which the trial Court and the Supreme Court doubtless took judicial notice.

It might be pertinent to inquire why the sheep were not driven to their destination, if they were intended for the market, or why they were not driven to the feeding pens in Nebraska if they were to be fed there before being taken to the market. It is no answer to this inquiry to suggest that the plaintiff in error had a right to drive them as far as he pleased and to put them on the cars wherever he pleased. His right is not questioned, nor is it a subject of inquiry in this case. The subject inquired about was as to his *purpose*, and his purpose could only be determined from a consideration of all the facts and circumstances in the case. The Court knew judicially that the sheep, so far as driving was concerned, could have been driven to the markets or they could have been driven to the feeding pens in Nebraska—but they were not so driven. The question would naturally arise, why were they not so driven? They were driven from the western line of Wyoming to the eastern line, practically. Why not continue them on through the State of Nebraska? The Court, it seems to be conceded, could take judicial notice of the fact that the sheep could

not be grazed in the State of Nebraska. They could be driven into and through the State of Nebraska. If then the only question was the driving or transporting of the sheep, and the sheep were not driven either in, through or into the State of Nebraska, it would seem to follow that they were not so driven in Nebraska because they could not graze in the State of Nebraska, and it would further seem to follow that they were driven through the State of Wyoming simply because they could graze in the State of Wyoming. In other words, the conclusion would seem to be entirely reasonable that the purpose for which these sheep were driven into Wyoming was that of grazing and not merely that of transporting them from one point to another.

Counsel for plaintiff in error seems to contend that it was the intention of the owner, or the purpose of the owner, to transport his sheep by rail either to the markets or to the feeding pens, and that for that reason he could have had no purpose or intention of grazing them in Wyoming. As suggested by the Chief Justice of Wyoming, in the opinion of the Court, the intention or purpose to transport live stock of all kinds to market or to feeding places is doubtless present with all owners of live stock, and in this respect, therefore, the plaintiff in error was in no different position from that of all other owners of live stock. Therefore the intention or purpose present in the mind of the plaintiff in error could not in the nature of things be the determining factor; nor would such intention or purpose be at all inconsistent with the purpose of grazing them in Wyoming.

Again, as it is the plaintiff in error who assails the judgment, he must present such a record as would irresistibly lead to the conclusion that the intention or purpose to transport the sheep from Pine Bluffs Station was the only

intention or purpose, at least to the extent of excluding any intention or purpose on his part of grazing them in Wyoming. This the record does not disclose.

And, again, it is an elementary proposition running through the entire law of evidence, that the intention or purpose of an individual is never to be determined exclusively from what he says his intention or purpose was. His intention or purpose is determined from all the facts and circumstances involved in the transaction. The Court must determine what the intention or purpose in fact was in this case. The absence from the record of material evidence which might have been given is often significant. We have in the case at bar the failure of a definite or explicit statement that plaintiff in error's purpose in bringing the sheep to Wyoming was merely to transport them by rail, and to exclude the purpose, or any purpose, of grazing them.

It is significant that in all cases involving questions of inter-state commerce, so far as these questions have embraced routes of travel, or shipment, or transportation, they have involved customary routes of travel either on water, or by rail, or on land. In this case the evidence does not disclose that the sheep were driven over any route of travel whatever. So far as the route of travel is significant at all, the evidence does not disclose that any route of travel was followed, or that the sheep were being driven along, through, or over any route or highway. So it is submitted that, so far as the question of route is concerned in its bearing upon the question of inter-state commerce, the failure of the agreed facts to disclose such a route or highway can militate only against the plaintiff in error.

III.

SOME PERTINENT AUTHORITIES.

It is argued that the authorities cited in the opinion of the Supreme Court of Wyoming in this case do not support the judgment rendered herein. It is submitted that these authorities sustain the following proposition:

PROPOSITION 3. A State statute authorizing the levying of a tax upon live stock which are brought into the State for a purpose similar to the purpose for which live stock are maintained therein, as for instance for grazing, or for the purpose of being fed, is not an unconstitutional statute; and the tax levied upon live stock brought into a State for such purpose is a valid tax, notwithstanding the fact that the live stock may have been brought into the State for a short period of time, or the fact that the live stock may have been driven into or through the State "on foot", or were "through cattle", or were ultimately designed for shipment into another State.

Myers vs. Palmer County, 83 Md., 385.
Waggoner vs. Whaley, 21 Tex., Civ. App. 1.
Prairie Cattle Co. vs Williamson, (Okla. Jul. 30th, 1897) 49 Pac., 937.
Collins vs. Greene, (Okla. June 30th, 1900) 62 Pac. 813.
Lasater vs. Greene, (Okla. June 30th, 1900) 62 Pac., 816.
Halff vs. Greene, (Okla. June 30th, 1900) 62 Pac., 816.
Russell vs. Greene, (Okla. June 30th, 1900) 62 Pac., 817.

It is submitted that the statutes involved in the above cases were, so far as the principle contended for in the case

at bar is concerned, essentially the same as the Wyoming statute. In the above cases contentions very similar to, and some of them identical with, the contention made on behalf of plaintiff in error in the case at bar, were made and they were not sustained by the Supreme Courts of the respective States.

These authorities, together with others involving essentially the same principles, were referred to by the learned Chief Justice of Wyoming, in the opinion of the Court, and are here cited as sustaining the correctness of the above proposition, and as illustrating the application of familiar principles of inter-state commerce law, and the power of taxation by the various States, to new conditions arising in some of the arid States, where, as in older States and under more favorable conditions, human nature remains about the same; and the efforts to escape the burdens of taxation, borne by other property under similar conditions, are attempted to be justified by asserting that thoroughly well-established principles of the law of inter-state commerce and taxation can be applied only to old conditions, and can not be extended and expanded to reach and cover new and varying conditions.

Conclusion.

It is therefore submitted in conclusion, as follows:

1. That the only question involved in the case is a question of fact, and that fact is simply whether the sheep in question were brought into the State of Wyoming for the purpose of being grazed; and that there is no Federal question involved.

2. That the fact was determined by the judgment of the trial Court that the sheep were so brought into the State of Wyoming for the purpose of being grazed.

3. That this judgment was based upon admitted facts which were entirely consistent with and supported such judgment.

4. That from all of the facts agreed upon, it nowhere appears, either expressly or by necessary implication, that the sheep were not brought into the State of Wyoming for the purpose of being grazed.

5. That the judgment rendered by the trial Court can not, under any view of the case, be said to be manifestly against the facts admitted or the weight of the evidence in the case.

It is therefore submitted that the judgment of the Supreme Court of the State of Wyoming should be affirmed.

Very respectfully,

WILLIS VAN DEVANTER and
W. R. STOLL,
Attys. for Defendant in Error.